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No. 80-2080

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RON TONKIN GRAND TURISMO, INC.,

Petitioner,

v.

FIAT DISTRIBUTORS, INC., and
WAKEHOUSE MOTORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT WAKEHOUSE MOTORS, INC., OPPOSING THE PETITION

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QUESTION PRESENTED

1. Wakehouse Motors, Inc., a Fiat automobile dealer with a diminutive share of the relevant market, protested to Fiat the proposed appointment of Tonkin as an additional Fiat dealer. Can this act, if true, constitute an illegal restraint of trade or a group boycott as prohibited by Section 1 of the Sherman Act absent any proof whatsoever of any anti-competitive actions or results?

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STATEMENT OF THE CASE

Because of inaccuracies contained in petitioner's Statement of the Case and because of petitioner's failure to cite to the record, respondent presents its own statement of the case.

Tonkin contends that Fiat and Wakehouse "collectively restrained trade and engaged in a boycott by totally supressing all potential competition for the sale of Fiat automobiles, parts, service, and warranty work, in two of Oregon's most populous counties." (Pet. 4) Wakehouse owned a Fiat franchise in the greater Portland area for ten years prior to the date this case was filed. Wakehouse held a very small share of the relevant product market (small foreign cars) in Portland, ranging from less than one percent to two percent (Tr. 60, 164-165, 193-202). On October 18, 1974, Tonkin signed a Fiat franchise application which clearly stated that the

application did not constitute a binding agreement (Tr. Ex. 102). Upon learning of the proposed additional franchise, Wakehouse dispatched a representative to the Fiat home office in New Jersey on October 21, 1974. As a result of subsequent discussions, Fiat granted Wakehouse two ninety-day probation periods during which Wakehouse was to make certain improvements in sales (Mixsel Depo. at 57, 80-81, 111-112, 234-235). Fiat agreed to defer a decision to grant Tonkin a franchise until the conclusion of the probationary period (Manning Depo. Tr. at 37). When Wakehouse succeeded in meeting these goals, Fiat dropped the matter of an additional franchise in the Portland area (Mixsell Depo. at 112, 236).

REASONS FOR DENYING WRIT

A. The decision of the Ninth Circuit Court of Appeals is consistent with the holdings of other circuits.

Tonkin cites several cases from other Circuits to support his allegation that the Ninth Circuit's decision conflicts with previous holdings of other circuits. None of the cited cases are on point.

Tonkin cites Quality Mercury, Incorporated v. Ford Motor Company, 542 F.2d 466 (8th Cir. 1976), cert. den., 433 U.S. 914 (1976). In that case Ford gave a Minneapolis dealer sole discretion to determine whether any new Lincoln dealership would be permitted in the area. Quality Mercury at 468. The Court reversed a judgment on the pleadings for defendant, finding that absence of a valid business reason for the restraint, combined with the investment of sole discretion within the dealer on a perpetual basis "renders reasonable the inference of an anti-competitive motive or effect." Quality Motors at 470. These factors were an integral part of the Court's analysis. Quality Motors at 471. The

present case is different. Here, Wakehouse was not granted sole discretion, nor was that discretion to last perpetually. Therefore, the Quality Mercury case is not on point.

Second, Tonkin cites American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3rd Cir. 1975). In that case, Holiday Inns rejected an application for a franchise following a negative response by several existing franchisees in the area. The Court found that a negative response from the several franchisees constituted a veto of the franchise application and resulted in a horizontal restraint of trade.

The case is factually inapplicable since Wakehouse was the only dealer and was merely protecting his exclusive dealership - a lawful arrangement. See, GTE Sylvania, Inc. v. Continental TV, Inc., 433 U.S. 36 (1977). A single dealer cannot

constitute a group boycott analogous to Holiday Inns.

Tonkin also cites U.S. v. Topco Associates, 405 U.S. 596 (1972). In that case a number of grocery store chains formed Topco, a private label line of grocery products. Each participating grocer was given an exclusive territory and had the power to veto any application for a franchise. Once again, this case involves a horizontal restriction, where competitors agree to divide up the market to the exclusion of outsiders. Both American Motors and Topco involved conspiracies among horizontal competitors, and therefore are not applicable to this case.

Third, Tonkin cites Cernuto, Inc. v. United Cabinet Corporation, 595 F.2d 164 (3rd Cir. 1979). Cernuto, a discount retailer of cabinets, was cut off by its supplier at the request of one of Cernuto's competitors. The Third Circuit reversed summary

judgment for the defendant. Cernuto at 165. The Court emphasized the importance of price in the alleged conspiracy, in other words, the motivation of the competitor to squelch price competition by Cernuto, a prohibited "pernicious" effect on competition.

In Cernuto, the Third Circuit distinguished a Second Circuit decision, Oreck Corporation v. Whirlpool Corporation, 579 F.2d 126, (2nd Cir. 1978) en banc, cert. den. 439 U.S. 946, reh. den. 439 U.S. 1104 (1979). In Oreck, plaintiff charged that Whirlpool and Sears engaged in a conspiracy to exclude Oreck from the vacuum cleaner market. Oreck was an exclusive distributor of vacuum cleaners under the Whirlpool name. Whirlpool also sold to Sears under the Kenmore brand. Oreck alleged that Whirlpool did not extend Oreck's exclusive dealership at the insistence of Sears. The Second Circuit refused to apply

the per se rule, stating that in order for the agreement to violate Section 1 of the Sherman Act, the agreement must be shown to be anti-competitive in purpose or effect; that is, it had to have an effect on the marketplace beyond the interests of the dealer himself. In Cernuto, the Court correctly distinguished Oreck because of the lack of proof in that case of price fixing and the fact that Whirlpool had only refused to extend a contract and had not breached a contract as in the Cernuto case.

Clearly, the present case falls under facts similar to Oreck since Tonkin has not offered evidence of price fixing or other adverse effect on competition other than as it would affect Tonkin itself as a potential dealer.

Tonkin has cited several cases from various circuits which he claims demonstrate a conflict with the Ninth Circuit opinion.

However, these cases involve horizontal restraints by several competitors or vertical restraints combined with predatory circumstances such as price fixing. In this case, Wakehouse has not conspired with horizontal competitors, nor has it attempted to price fix.

B. The decision of the Ninth Circuit does not conflict with this Court's decisions.

Tonkin's reference to a string of Supreme Court decisions, with no explanation as to how they conflict with the Ninth Circuit decision, merits no comment here.

As one example of the conflict between the Ninth Circuit's decision and the decisions of this Court, Tonkin oddly cites Westman Commission Company v. Hobart, 461 F.Supp. 627 (D. Col. 1978) a District Court case. Westman is not applicable here because in that case the relevant product market was limited to the product of one manufac-

turer who had a monopoly position. Therefore, when a dealer was terminated as a franchisee, he was precluded from competing at all since there was no interbrand competition - no substitute products which it could sell. In this case Tonkin was not precluded from competing in the automobile market, since there are innumerable brands and models.

Tonkin misunderstands that the definition of the relevant market is not limited to the Fiat brand where there is significant, even extraordinary interbrand competition. Mogul v. General Motors Corp., 391 F.Supp. 1305 (W.D. Pa. 1975); Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F.Supp. 453 (W.D. Pa. 1968), aff'd 417 F.2d 622 (3rd Cir. 1969); Borger v. Yamaha International Corp., 625 F.2d 390 (2nd Cir. 1980).

Corey v. Look, 641 F.2d 32 (1st Cir. 1981), cited by Tonkin, is the same situation. In that case, plaintiff was blocked

by the City, at the request of a steamship authority, from securing a parking lot within the City. Again, the relevant product market was determined to be parking lots within the City. Therefore, the plaintiff was precluded from competing in the relevant product market, there being no substitute product.

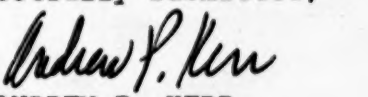
In this case Tonkin was by no means precluded from competing in the relevant product market. The market was determined by the Magistrate to be sales of automobiles. At most, Fiat controlled less than six percent of the small foreign car market in Portland, Oregon (Tr. 161-167). Consequently, Tonkin has available to him a wide range of brands of foreign cars which he could sell in order to compete. The actions of Fiat and Wakehouse have in no way precluded Tonkin from competing.

CONCLUSION

The decision of the Ninth Circuit does not conflict with decisions from the various other circuits. Similarly, it does not conflict with the decisions of this Court.

The Ninth Circuit correctly upheld the District Court's grant of summary judgment in favor of Wakehouse. Wakehouse controls a very small portion of the relevant product market. Given these facts, and absent any allegations or proof that the actions of Wakehouse had a pernicious purpose or effect on competition, the Petition of Tonkin should be denied.

Respectfully submitted,



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June 29, 1981